DATE: JANUARY 11, 1996

CASE NO: 94-INA-448

In the Matter of

JERRY LEIPZIG
Employer

on behalf of

VICTORIA CNNANI
Alien

Before: Jarvis and Vittone
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Jerry Leipzig's ("Employer")request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On May 14, 1993, Employer filed a Form ETA 750, Application for Alien Employment Certification with the Florida Department of Labor and Employment Security ("FDLES") on behalf of the Alien, Victoria Cnnani. AF 27. The job opportunity was listed as Hebrew Language and History Tutor. Id. FDLES determined that the occupational title was that of Tutor and assigned it the occupational code of 099.227-034. Id. The work schedule box (No. 11) in the Form ETA 750 indicated that the job hours were as follows:

Monday through Thursday:	3 p.m. to 7 p.m.
Friday:	3 p.m. to 6 p.m.
Saturday:	9 a.m. to 7 p.m.
Sunday:	10 a.m. to 6 p.m.

FDLES referred one applicant for the job who was not hired. AF 21-22. The file was transmitted to the CO. AF 14.

On February 11, 1994, the CO issued a Notice of Findings ("NOF") in which he proposed to deny the application. AF 10. The CO found that the work schedule was unduly restrictive and had a chilling effect on U.S. workers. AF 13. The CO pointed out that the tutor was required to work Monday through Thursday 3:00 p.m. to 7:00 p.m., Friday 3:00 p.m. to 6:00 p.m., Saturday 9:00 a.m. to 7:00 p.m., and Sunday 10:00 a.m. to 6:00 p.m., which provided no days off per week. Id.

The NOF required Employer to establish business necessity for the work schedule or readvertise the position with a work schedule that was not unduly restrictive. Id.

Employer filed a timely rebuttal. AF 5-9. Employer contended that the work schedule was justified by business necessity. The Employer submitted an affidavit which stated that: His sons, for whom the tutor will be hired, are 10 and 14 years old. One attends school on weekdays from 8:00 a.m. until 2:00 p.m. The other attends school on weekdays from 8:00 a.m. until 4:00 p.m. Employer contended that this justified as a business necessity the Monday-Thursday work schedule. The Employer also contended that as the Jewish sabbath begins at sundown on Friday, the work schedule for that day was justified as a business necessity. The Employer also stated that the duties performed during the Saturday hours would include preparation for synagogue, accompanying the children to worship, and discussing religious ritual and significance in the

afternoon. Sunday duties included a complete review of the previous week's studies, as well as preparing lesson plans for the next week, and discussing them with Employer and his wife. AF 8.

The CO issued a Final Determination ("FD") denying certification on April 12, 1994. AF 3. The CO found that Employer had failed to rebut the finding that the work schedule was unduly restrictive. AF 4. The CO also stated that:

> The employer's rebuttal indicates that "the weekend hours of 9 a.m. until 7 p.m., and Sunday from 10 a.m. until 6 p.m., constitute the only full days of employment, as neither child is in school at those times". The employer further states "those hours include spending time at religious services, as well as ritual observances both Friday evening and Saturday". It appears that the employee will be a babysitter on the weekends and not a tutor. Id.

Employer filed a timely request for review. AF 1. Employer also filed an Appellant's Brief.

DISCUSSION

Employer argues in his Brief that the FD failed to adequately consider and discuss the evidence provided by him in rebuttal to the NOF. There is no merit to this contention.

The NOF found that the work schedule required by Employer was unduly restrictive, did not provide for any days off and had a chilling effect on U.S. workers. AF 13. Employer was required to prove that there was a business necessity for the work schedule or readvertise. Id.

As a seven-day work week with no days off is not customary in the United States for most occupations, including Tutor, the CO properly required Employer to establish a business necessity for the work schedule. Gregory G. Khaklos, 94-INA-50 (November 16, 1994). [1] Employer had the burden of proof for establishing business necessity. Production Tool Corporation,

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[1] Technically, the job schedule here under consideration is not a split shift. Webster's Third New International Dictionary, p. 2202. However, the cases dealing with split shifts are probative to the unusual configuration of hours in this case.

93-INA-187 (February 21, 1995); Kim Kyung Nam-"La Famillia", 93-INA-97 (June 5, 1994).

As indicated, Employer sought to justify the Monday-Friday work hours on the basis of the hours his sons attend school and the beginning of the Jewish sabbath on Friday. AF 8. Employer's affidavit included the duties to be performed by the Tutor for the ten hours on Saturday and eight hours on Sunday. Id.

Employer argues that the Fair Labor Standards Act ("FLSA") provides for a basic forty-hour work week but does not stipulate that these hours cannot be performed over seven consecutive days (29 U.S.C. §207(a)) and that Florida law establishes that a ten-hour work day is legal (Fla. Stats. Annotated §448.01). Brief at pp 5-6. Thus, Employer argues that the work schedule could not have a chilling effect on U.S. applicants. This argument misses the point.

The question to be considered is not whether the work schedule meets the criterion for determining the basic work week under the FLSA for the purpose of calculating overtime. Nor is it whether the work schedule exceeds the maximum number of hours permitted under Florida law. The issue is whether the job opportunity offers prevailing working conditions. 656.21(g)(5), and, if it does not, whether Employer has justified the variance on the ground of business necessity.

The CO found that Employer had not justified the job hours because some of the duties described for Saturday and Sunday were not tutorial. AF 4. Employer's rebuttal stated that the work hours "include spending time at religious services, as well as ritual observances both Friday evening and Saturday." AF 6. Employer's affidavit stated that the Saturday hours include preparation for synagogue and accompanying the children to worship. AF 8. These type of activities do not appear in the DOT description of the occupational title of Tutor (099.227-034). This kind of duty is included in various service occupations: Child Monitor (301.677-010)-Accompanies children on walks or other outings. Companion (309.677-010)-Accompanies employer on trips and outings.

Employer's rebuttal attempted to establish business necessity for the work schedule by including activities not associated with the DOT job description of Tutor. The CO did not abuse his discretion in finding that Employer had failed to rebut the findings of the NOF by failing to establish a business necessity for the work schedule.

ORDER

The final determination of the Certifying Officer denying labor certification is **AFFIRMED**.

Entered this ___ day of _____, 1996.

For the Panel:

DONALD B. JARVIS
Administrative Law Judge

DBJ/bg